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IN THE
COURT OF APPEALS OF INDIANA

CLARENCE SLONE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A04-0511-CR-636
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0304-FD-109

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Clarence Slone brings this interlocutory appeal from the trial court's denial of his motion for discharge pursuant to Ind. Criminal Rule 4. Slone raises one issue, which we restate as whether the trial court erred by denying Slone's motion for discharge. We reverse and remand.

The relevant facts follow. On April 11, 2003, the State charged Slone with operating a vehicle while endangering a person as a class D felony[1] and operating a vehicle with a blood alcohol content of .15 or more as a class D felony.[2] On June 6, 2003, the State filed a motion to amend the information by adding an habitual substance offender allegation. The trial court set a pretrial conference for August 4, 2003. On August 4, 2003, Slone requested a continuance of the final pretrial conference. The trial court rescheduled the pretrial conference for September 15, 2003. On September 15, 2003, the trial court set the jury trial for February 18, 2004. On December 9, 2003, the trial court rescheduled the jury trial for February 16, 2004, due to a conflict in the trial court's calendar.

On February 10, 2004, Joyce Jones, Slone's sister-in-law, informed the trial court that Slone was incarcerated somewhere in Kentucky. On February 11, 2004, Jones failed to appear for a motions hearing. On February 17, 2004, the trial court issued a warrant

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[1] Ind. Code § 9-30-5-2 (2004); Ind. Code § 35-50-2-7 (subsequently amended by Pub. L. No. 98-2003, § 3 (eff. July 1, 2003); Pub. L. No. 71-2005, § 10 (eff. April 25, 2005)).

[2] Ind. Code § 9-30-5-1 (2004); Ind. Code § 35-50-2-7 (subsequently amended by Pub. L. No. 98-2003, § 3 (eff. July 1, 2003); Pub. L. No. 71-2005, § 10 (eff. April 25, 2005)).

for Slone. On April 12, 2004, the trial court held an unscheduled hearing, at which Slone appeared via video conference. The trial court advised him of the reason for the arrest warrant and scheduled a pretrial conference for July 12, 2004. On July 12, 2004, Slone appeared at the pretrial conference, and the trial court scheduled the jury trial for October 18, 2004. On October 18, 2004, the trial court did not hold a jury trial, and no entry appears on the chronological case summary for that date. On November 17, 2004, the trial court rescheduled the pretrial hearing for February 23, 2005, and recited that the case had been removed from the jury trial calendar on October 18, 2004, due to courtroom unavailability and court congestion. On February 23, 2005, the trial court held a pretrial hearing and scheduled a jury trial for August 1, 2005. On March 29, 2005, the trial court rescheduled the jury trial for September 12, 2005, due to a conflict in the judge's schedule.

On September 8, 2005, Slone filed a motion for discharge pursuant to Ind. Criminal Rule 4(C). Slone argued that he had been entitled to discharge since October 18, 2004. That same day, the trial court held a hearing and denied Slone's motion. Slone filed a request for certification of an interlocutory appeal, and the trial court granted the motion. Thereafter, we accepted jurisdiction of the interlocutory appeal pursuant to Ind. Appellate Rule 14(B).

The issue is whether the trial court erred by denying Slone's motion for discharge. We review this matter de novo. See Vaughan v. State, 470 N.E.2d 374, 377 (Ind. Ct. App. 1984) (implicitly reviewing an Ind. Criminal Rule 4(B) question about which party

was responsible for a delay under a de novo standard), reh'g denied, trans. denied. See also Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), reh'g denied, trans. denied.

Slone argues that October 18, 2004, was the last possible day that he could be tried under Ind. Criminal Rule 4(C) without a proper State continuance or order by the trial judge. Ind. Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons. Ritchison v. State, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The Indiana Supreme Court recently held that delays caused by actions taken by a defendant are chargeable to the defendant regardless of whether a trial date has been set. Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004). Upon appellate review, a trial court's finding of court congestion will be presumed to be valid and need not be

contemporaneously explained or documented by the trial court. Clark v. State, 659 N.E.2d 548, 552 (Ind. 1995). When a motion for discharge for an Ind. Criminal Rule 4 violation is made prematurely, it is properly denied. Stephenson v. State, 742 N.E.2d 463, 487, n.21 (Ind. 2001), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002).

The State argues that Slone waived appellate review of this issue because he did not request a transcript of the February 23, 2005, pretrial conference, did not object during the pretrial conference, and did not file a motion for dismissal until September 8, 2005. A defendant has a duty to alert the court when a trial date has been established beyond the proscribed limits. Huffman v. State, 502 N.E.2d 906, 908 (Ind. 1987), reh'g denied. A defendant's right to the speedy trial that he requested can be waived. Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999), reh'g denied. If a defendant fails to object to a delay that results in a later trial date, then the length of that delay extends the time limitations set in Ind. Criminal Rule 4. Id. However, "[a] defendant has no duty to object to the setting of a belated trial date when the act of setting such date occurs after the time expires such that the court cannot reset the trial date within the time allotted by the rule." Morrison v. State, 555 N.E.2d 458, 463 (Ind. 1990). Thus, we must determine whether the act of setting such a date occurred after the expiration of the period provided in Ind. Crim. Rule 4(C).

The State charged Slone on April 11, 2003. Thus, the State was required to bring Slone to trial by April 11, 2004, unless the one-year period was extended by delays not chargeable to the State. On August 4, 2003, Slone requested a continuance of the final

pretrial conference. The trial court rescheduled the pretrial conference for September 15, 2003. This extended the one-year deadline by forty-two days. (Cumulative extension (hereinafter, "C.E.") 42 days). Slone failed to appear for the February 11, 2004, hearing, because he was incarcerated, and he did not appear in person until July 12, 2004. This extended the one-year deadline by 152 days. (C.E. 194 days) See Werner v. State, 818 N.E.2d 26, 30-31 (Ind. Ct. App. 2004) (holding that a defendant whose case is midstream in one county and who is subsequently arrested on unrelated charges in another county must provide formal written notice of his incarceration to the court and the State to avoid the tolling of the Rule 4(C) clock), trans. denied. The above delays extended the one-year limit by 194 days to October 22, 2004. The trial court had a jury trial scheduled for October 18, 2004, however the trial court did not hold a jury trial that day and no entry appears on the chronological case summary for that date. The trial court did not enter an order until November 17, 2004. Thus, Slone had no duty to object to the setting of a belated trial date because the act of setting such a date occurred after the time expired. See Morrison, 555 N.E.2d at 463 ("A defendant has no duty to object to the setting of a belated trial date when the act of setting such date occurs after the time expires such that the court cannot reset the trial date within the time allotted by the rule."). Accordingly, Slone has not waived this issue. See State v. Tomes, 466 N.E.2d 66, 70 (Ind. Ct. App. 1984) (affirming the trial court's grant of the defendant's motion for discharge pursuant to Ind. Criminal Rule 4(C) and holding that "waiver arises only where defendant learns,

within the period during which he could properly be brought to trial, that the court proposes trial on an untimely date").

Slone argues that the trial court failed to comply with Ind. Criminal Rule 4(C). The State argues that the trial court did not have the ability to enter a contemporaneous order and relies on the trial court's statements during the dismissal hearing. At the hearing, the trial court stated:

> Well, after – the biggest issue we are getting into here is now we are taking advantage of the fact that our courtroom or our courthouse became a hazard zone and because of that we had to push a whole bunch of stuff off not having a clue where we were going to try anything and this definitely jumps itself outside of what would normally be considered a valid or invalid reason for court congestion because it came out a month after the fact.
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> From the courthouse and while I understand the – perhaps understand the motion and I would probably mostly agree with it, I am not going to grant it because I think we have bent over backwards to try to get these things moving and keep things moving in this courthouse. Because my order came a month later, that doesn't – I think the wording of that – I agree Mr. Lauer, the wording of that case says that basically you are to make a contemporaneous order therewith but I know we were in transition at that time, so trying to say we were able to keep our heads above water when we moving [sic] all of our cases, all over our office and everybody else's offices and trying to find courtrooms, if I remember correctly, we had to fish for courtroom to be able to even find out where we were, uh, I think that's clearly a delay that should not be just against the State, it's against everybody involved that we were not here.

Transcript at 8-9.

We find Huffman v. State, 502 N.E.2d 906 (Ind. 1987), instructive. In Huffman, the defendant was arrested on August 6, 1982. Huffman, 502 N.E.2d at 907. Without

any delay caused by the defendant, his trial was set for June 16, 1983. Id. A trial did not occur as scheduled, and on June 20, 1983, the State filed a written "request for trial setting and showing court's congestion," which was not ruled upon until September 29, 1983. Id. On August 25, 1983, the defendant filed a motion for discharge pursuant to Ind. Criminal Rule 4(C), which was denied. Id. On September 29, 1983, the trial court made a "nunc pro tunc entry for June 20, 1983," which stated that the trial could not have occurred on June 16, 1983, due to court congestion. Id. On September 30, 1983, the trial court made "a further nunc pro tunc entry as of September 1, 1983," which denied the defendant's motion for discharge and stated that "the matter could not have been tried at any time after June 13, 1983, up to the time of defendant's filing of his motion for discharge" because of court congestion. Id. The defendant's trial commenced on October 18, 1983. Id.

On appeal, the Indiana Supreme Court held:

> The instant case is unlike those in which, *within the time limit prescribed by the rule*, the trial court determines that court calendar congestion compels the setting of a trial date promptly beyond the time limit. Nor is this a case in which the defendant failed to object to the timely setting of a trial which would occur beyond the limit.
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> In the case before us, the salient facts are clear. The State did not act to bring the defendant to trial within the required one year period. During this time, no delay was attributable to the defendant. The State failed to file any motion for continuance pursuant to Criminal Rule 4(A), (C), before the June 16 trial date, which would have been within the prescribed time limit. The one-year period expired August 7, 1983. Prior to that time, the trial court had not made any determination regarding congestion of court

> calendar. The date of the trial which finally occurred, over defendant's objection, was not set until September 30, long after the expiration of the time limit.

Id. at 908 (citations omitted). The court concluded that "because of the State's failure to bring the defendant to trial within one year, or to otherwise qualify under the alternative provided in the rule, we are compelled to apply the provisions of Criminal Rule 4(C)." Id.

Under Huffman, we must conclude that the trial court's November 17, 2004, order was ineffective.[3] Here, as in Huffman, the trial court did not enter a finding of congestion before the expiration of the time limit provided by Ind. Criminal Rule 4(C). When the trial court set the matter for trial, the one-year time limitation of Ind. Criminal Rule 4(C) had already expired. Because the State failed to bring Slone to trial within one year under the provisions of Ind. Criminal Rule 4(C), Slone is entitled to discharge. See, e.g., Morrison, 555 N.E.2d at 463 (reversing a defendant's convictions and ordering his

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[3] In Huffman, Justice DeBruler wrote:

> A nunc pro tunc entry is "an entry made now of something which was actually previously done, to have effect as of the former date." Perkins v. Hayward (1892), 132 Ind. 95, 31 N.E. 670. The office of such an entry is to make the record reflect the character, terms, and conditions of true action taken. Cook v. State (1941), 219 Ind. 234, 37 N.E.2d 63. Here, there never was an action taken or event recorded, even if one chooses to credit the first nunc pro tunc entry for June 20, 1983, which evidences such a congested court calendar, as would demonstrate that there was not sufficient time to try appellant before the expiration of the early trial time frame in August.

Huffman, 502 N.E.2d at 909 (DeBruler, J., concurring). Here, the record does not indicate that a finding of congestion or courtroom unavailability occurred on October 18, 2004. Thus, we cannot conclude that the November 17, 2004, order constitutes a nunc pro tunc order.

discharge where he was not brought to trial within the required time period of Ind. Criminal Rule 4(C)).

For the foregoing reasons, we reverse the trial court's denial of Slone's motion for discharge pursuant to Ind. Criminal Rule 4(C).

Reversed and remanded.

KIRSCH, J. and MATHIAS, J. concur